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# ON THE ORIGIN OF THE CONSTITUTION *ALEARUM LUSUS* (C. 3,43,1) AND ITS INSERTION INTO THE *CODEX JUSTINIANUS*

Jan Hallebeek\*

## Summary

The article explores the origin of C. 3,43,1 which is a Latin epitome (*Alearum lusus*) of an originally Greek constitution of Justinian's. The main issues discussed are when this constitution was translated, epitomized and by whom and when it was inserted in book III of the *Codex*. This is done by investigating the traces of the approximate times when the influence of the constitution in legal doctrine is apparent, both in civil and canon law. Furthermore, some commentaries on the *Decretum Gratiani* appear to reveal further information on the origin of the Latin text. The article aims at contributing to a better understanding of the genesis of the text of the *Codex Justinianus* as we know it in the early modern editions and Krüger's 1877 edition.

## Keywords

*Alearum lusus*, C. 3,43,1, Pedro de Cardona

## 1. – Introduction

The genesis of the *Codex Justinianus* in its late medieval form, which underlies early modern editions and the 1877 edition by Paul Krüger (1840-1926)<sup>1</sup>, is still veiled in mist. The oldest manuscripts, containing a more or less complete text of the *Codex*, date from between 1080 and 1120. It is still under debate whether this 'restored' text resulted from the discovery of an ancient non-epitomized version of the *Codex*, comparable to the *Littera Florentina* of the Digest, or was produced by comparing existing versions of the *Epitome Codicis* as handed down through the centuries<sup>2</sup>. Another mystery is the gradual insertion of Latin translations or Latin epitomes of Greek [130] constitutions, which were probably made in the twelfth century. One of these is the constitution *Alearum lusus*, which in the Krüger edition is C. 3,43,1. The text in the editions is a medieval Latin epitome. It is thought that the original Greek constitution of the Emperor Justinian (ca. 482-565) has been lost. Hermann Kantorowicz (1877–1940) suggested in a posthumously published article that *Alearum lusus* was translated by the Catalan jurist Pedro de Cardona († 1183). Hitherto solid proof has been lacking<sup>3</sup>. The purpose of this contribution is to cast more light on the translating and summarizing of this constitution, as well as its insertion into book III of the *Codex*.

## 2. – The content of *Alearum lusus* compared to Digest 11,5

In the Krüger edition of the *Codex* the constitution *Alearum lusus* is the first provision in title 3,43 *De aleae lusu et de aleatoribus*, a short title almost at the end of the third book. It

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\* VU University Amsterdam, Faculty of Law, De Boelelaan 1105, 1081 HV Amsterdam. The Netherlands; [j.hallebeek@vu.nl](mailto:j.hallebeek@vu.nl).

<sup>1</sup> P. Krüger, *Codex Iustinianus*, Berlin, 1877.

<sup>2</sup> See on this discussion C.M. Radding and A. Ciaralli, *The Corpus iuris civilis in the Middle Ages. Manuscripts and transmission from the sixth century to the juristic revival* [Brill's Studies in Intellectual History, 147], Leiden–Boston 2007, p. 155ff.

<sup>3</sup> H. Kantorowicz, *A Greek Justinian Constitution quoted in the Dissensiones Dominorum*, Seminar. Annual Extraordinary Number of the Jurist 3 (1945), p. 46–56, reprinted in H. Kantorowicz, *Rechtshistorische Schriften*, edited by H. Coing and G. Immel, Karlsruhe 1970, p. 187-196.

deals with the game of dicing and dice players.<sup>4</sup> Among its other provisions, the said constitution ruled that gambling was to be prohibited. It was allowed only in the case of five games, explicitly listed, and for no more than one gold piece (*solidum*). Furthermore, the constitution ruled that players or their heirs, alternately the magistrates or protectors of the municipalities, were entitled for a period of 50 years to claim back the gaming debts which had been paid to the winner.

There were three significant ways in which the constitution altered the law of the jurists (*ius*), as compiled in the Digest title on dice players (*De aleatoribus*, D. 11,5). Firstly, the Digest did not contain a general prohibition against dicing. It mentioned, by contrast, two situations where betting was explicitly permitted, *viz.* in case of some branches of sport, which were exercised *virtutis causa*<sup>5</sup>, and at the meal, where food could be the stake of the game<sup>6</sup>. Secondly, the Digest did not forbid gaming for more than one gold piece. In the third place, the Digest did not contain a general ruling that gaming debts, paid to the winner, could be claimed back, let alone subject to such a long limitation period as 50 years. Only in exceptional cases claiming back was possible, for example, when the player was a slave or a child under paternal control, or when the winner had ascendants or patrons who could be sued<sup>7</sup>. Thus, the constitution *Alearum lusus* seemed to be more restrictive as regards dice playing and gambling.[131]

### 3. – The appearance of *Alearum lusus* in manuscripts and editions of the *Codex*

From the manuscripts of the *Codex*, which date – at least as regards the principal text of the *Codex* – to the various periods within the twelfth century<sup>8</sup>, it appears that the constitution was not initially a settled provision of book III. In most cases, we trace the text of *Alearum lusus* as a marginal addition by a later hand. This holds good for the earliest manuscripts, where the text of the *Codex* is still copied right across the width of the text area of the membrane and not yet in two columns, such as Montpellier H. 82 (fol. 80r) and Avranches 141 (fol. 47v-48r)<sup>9</sup>. We find the same in manuscripts dating from the first half<sup>10</sup> and the second half of the twelfth century<sup>11</sup>. It is not always clear where in book III of the *Codex* the constitution had to be inserted. Mostly it seems to be an addition to the final constitution of the final title, the *lex Nemo humanum* (C. 3,44,14). It is sometimes provided with glosses of Azo or Accursius, exclusively consisting of explanations of words<sup>12</sup>. In a number of manuscripts the second *lex* of C. 3,43, *Prohibemus etiam*, forms a direct continuation of

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<sup>4</sup> See on Roman law concerning dicing in general J.L. Zamora Manzano, *La regulación jurídico-administrativa del juego en el derecho romano* [Monografías de Derecho romano, Derecho administrativo y fiscal romano], Madrid 2012.

<sup>5</sup> D. 11,5,2.

<sup>6</sup> D. 11,5,4pr.

<sup>7</sup> D. 11,5,4.

<sup>8</sup> For the dating I follow G. Dolezalek, *Repertorium manuscriptorum veterum Codicis Iustiniani* [Ius Commune SH, 23] Vol. I-II, Frankfurt/M 1985 and C. Tort-Martorell, *Tradición textual del Codex Iustinianus. Un estudio del Libro 2* [Ius Commune SH, 45], Frankfurt/M 1989.

<sup>9</sup> Berlin, SBPK, lat. fol. 272 (fol. 62v) has only a short marginal gloss “*de alee lusu et aleatoribus hic constitutio greca De religiosis ac sumptibus funerum*”.

<sup>10</sup> For example Wien, ÖNB, cvpl 2267 (fol. 59va), Berlin, SBPK, lat. fol. 274 (fol. 60vb), Vaticano, BAV, Vat. lat. 1427, Berlin, SBPK, lat. fol. 275 (fol. 52va-b), Montpellier H. 83 (fol. 66v), Paris, BNF, lat. 16910 (fol. 64rb) and London, BL, Harley 5117 (fol. 60r).

<sup>11</sup> For example Paris, BNF, lat. 4523 (fol. 59rab) and Paris, BNF, lat. 4527 (fol. 66rb).

<sup>12</sup> For example Montpellier H. 82, Wien, ÖNB, cvpl 2267 and Paris, BNF, lat. 4527.

*Alearum lusus*<sup>13</sup>. Moreover, the constitution may be provided with directions as "*sequitur constitutio noua super titulum de relig. etc.*"<sup>14</sup> or "*Autentica Justiniani imp.*"<sup>15</sup> or with the Latin inscription "*Imperator Justinianus (Augustus) Johanni pp.*"<sup>16</sup>. In manuscripts, dating from the end of the twelfth and beginning of the thirteenth centuries, the position of *Alearum lusus* becomes more prominent. In Alba-Iulia, II.4 (fol. 61v) it is written in letters larger than those of the principal text and the scribe indicated that it should, as a title, be located just before the title *De religiosis*. In Vaticano, BAV, Vat. lat. 1428 (fol. 87r) it is provided with the Latin inscription and, combined with the *lex Prohibemus etiam*, it seems to form a complete title with a heading of its own "*De alee lusu et aleatoribus Rubrica*".

[132] The early modern editions initially reflected more or less the image of the medieval manuscripts, although the text now seemed to be an integrated part of the *Codex* itself. It was no longer placed in the margin, but, together with the *lex Prohibemus etiam* (C. 3,43,2), followed the *lex Nemo humanum* (C. 3,44,14), as *lex XV* of the title *De religiosis*, at the very end of book III<sup>17</sup>. Some later editions, however, show a new humanist approach.

In 1562 the French scholar Jacques Cujas (1520–1590) had published a treatise on prescription and limitation periods, which was entitled *πραγματεῖα de praescriptionibus*. In this work he also discussed the exceptional long limitation period of 50 years, mentioned in the constitution *Alearum lusus*, and noticed a difference of opinion between two Byzantine scholars from the time of Justinian, viz. Anatolios and Thalelaios. According to the first, the limitation period for reclaiming gambling debts was 50 years. This, according to Cujas, was confirmed by the Latin epitome of the constitution itself and by the two Greek sources, he quoted. The first was the *Rhopai* (*Ῥοπαί*) a compilation of Justinianic provisions dealing with prescription and limitation periods and erroneously ascribed to the antecessor Eustathios (11<sup>th</sup> century). To his treatise Cujas had added a revised edition of the work<sup>18</sup>. The Greek words quoted say that money paid in prohibited games can be recovered at any time up to 50 years<sup>19</sup>. The second quotation is taken from the *Nomocanon*, a compilation of ecclesiastical and secular legislation, from as early as the seventh century. Probably Cujas quoted the text from a Greek manuscript, possibly Paris, BNF, grec. 1331. In 1561 only two Latin translations of the work were edited<sup>20</sup>. The quotation says that the claiming back of gambling debts is possible "continuously and even for more than 30 years"<sup>21</sup>. Cujas continued by stating that Thalelaios, on the other hand, was of the opinion that the claim lapses after 30 years, because, if this had not been intended by the corresponding text of the constitution in the *Basilica* (B. 60,8,5), it would have explicitly added that the remedy could exceed the period of

<sup>13</sup> For example Wien, ÖNB, cvpl 2267, Berlin, SBPK, lat. fol. 274, Vaticano, BAV, Vat. lat. 1427, Paris, BNF, lat. 16910, Paris, BNF, lat. 4523 and Paris, BNF, lat. 4527.

<sup>14</sup> Avranches 141 (fol. 47v-48r).

<sup>15</sup> Montpellier H. 83 (fol. 66v).

<sup>16</sup> Wien, ÖNB, cvpl 2267 (fol. 59va), Fulda 2° D.4 (fol. 80v) and London, BL, Harley 5117 (fol. 60r).

<sup>17</sup> Accursius, *Glossa in Codicem*, Venice 1488 (reprinted as *Corpus Glossatorum Juris Civilis* Vol. 10, Turin 1968), fol. 90r and *Codicis Iustiniani ex repetita praelectione libri novem priores*, Lyons 1560, column 524–525.

<sup>18</sup> The *Rhopai* were edited one year earlier (1561) by the German jurist and historian Simon Schard (ca. 1535–1573). See on Cujas' edition E. Spangenberg, *Jacob Cujas und seine Zeitgenossen*, Leipzig 1822 (reprint Frankfurt 1967), p. 236 and C.E. Zachariae, *AI POIIAI oder die Schrift über die Zeitabschnitte*, Heidelberg 1836, p. 6–8.

<sup>19</sup> In the critical edition it is *Rhopai* 44,1; see F. Sitzia (ed), *Le rhopai*, Naples 1984, p. 165.

<sup>20</sup> H.E. Troje, *Graeca leguntur. Die Aneignung des byzantinischen Rechts und die Entstehung eines humanistischen Corpus iuris civilis in der Jurisprudenz des 16. Jahrhunderts* [Forschungen zur neueren Privatrechtsgeschichte, 18], Cologne–Vienna 1971, p. 202ff.

<sup>21</sup> In the critical edition it is *Nomocanon* 13,29; see I.B. Pitra (ed), *Iuris ecclesiastici graecorum historia et monumenta*, Tom. II, Rome 1868, p. 630.

30 years<sup>22</sup>. [133] According to the fragment from the *Rhopai*, although not in the words literally quoted by Cujas, the Basilica would reflect the opinion of Thalelaios, where it does not mention the 50-year term.

The edition Lyons 1627 of the *Codex* was provided with the Accursian Gloss, but at the same time it was based on investigations of French humanist jurists as Antoine Leconte (1517–1586), Jacques Godefroy (1587–1652) and Cujas. Apart from the medieval Latin text of *Alearum lusus* in various versions, it included fragments from the Basilica and the Nomocanon<sup>23</sup>, provided with Latin translations, which were supposed to reflect the same Justinian constitution. In this edition we find *Alearum lusus*, together with *Prohibemus etiam*, twice, viz. as a separate title before C. 3,44, which was apparently the correct location according to the new humanistic reconstruction and, as Cujas explained<sup>24</sup>, also in conformity with the order of the Perpetual Edict, and also as *lex XV* of the same title, as in conformity with the medieval manuscripts<sup>25</sup>.

In his edition of the *Codex* (1877), Paul Krüger followed the humanistic approach by letting the constitutions *Alearum lusus* and *Prohibemus etiam* constitute a separate title (*De aleae lusu et de aleatoribus*) just before C. 3,44. He emended the Latin inscription of the former, which he considered corrupt. For one phrase of *Alearum lusus*, viz. “*Episcopis locorum ... utentibus*” (C. 3,43,1,3), a *locus geminus* was found in C. 1,4,25. This justified the adoption of the Greek inscription from C. 1,4,25 for the entire text of *Alearum lusus*. For the edition of the actual text of *Alearum lusus* Krüger used only three medieval manuscripts. His manuscript H is London, BL, Harley 5117, in which the text can be found at the end of book III in the margin (at the bottom of fol. 60r). Krüger’s manuscript W is Vaticano, BAV, Vat. lat. 1427. According to Krüger the text is written in the margin of this manuscript<sup>26</sup>. However, this is not the case. Actually it cannot be found at the end but at the beginning of book III (fol. 68rb) and not in the margin but within the text area on a membrane [134] the scribe had originally left blank<sup>27</sup>. It is provided in the margin with a direction as to where it belongs: “*Hec lex posita in fine ante illam rubricam de religiosis et sumptibus funerum quia loquitur de aleatoribus*”. The information concerning the location of the text in the third manuscript, Krüger’s manuscript G, which is nowadays Fulda 2° D.4, is correct. The text is again located

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<sup>22</sup> De diversis temporum praescriptionibus et terminis πραγματεῖα., cap. 32, in: Jacobus Cujacius, *Opera Omnia* Tom. I, Lyons 1614, column 309: “*De annis L. Cap. XXXII. Repetitio eius quod in alea lusum est praescriptione tricennii non tollitur. Anatolius eam tolli ait praescriptione annorum L. atque ita fuisse in l.l.C.de aleat. constat ex latina eius conuersione quae circumfertur, et eo quod Graeci allata illa lege sub hoc titulo scribunt iis uerbis: Οὐκ ἀντίκειται χρόνος τοῖς ἀπαιτοῦσι τὸ καταβληθὲν εἰς τι τῶν ἀπηγορευμένων παιγνίων εἰ μὴ μόνος ὁ πεντήκοντα ἐτής Non tolli eam tricennio epitoma Graeca, quae extat Nomocanonis tit.13. cap.29. indicat, dum ait eam competere διηνεκῶς καὶ παρὰ τριακονταετίας. At Thalelaeus eam tricennio tolli putat, quod in contextu βασιλικῶν id non fit adiectum ut tricennium egrediatur: quasi hoc sit ius nouissimum (...)*”.

<sup>23</sup> These were Basilica 60,8,5 and Nomocanon 13,29.

<sup>24</sup> Paratitla in libros IX Codicis Iustiniani repetitae praelectionis ab ipso edita, ad C. 3,43, in: Jacobus Cujacius, *Opera Omnia* Tom. III, Lyons 1614, column 58. Leconte is said to have been the first who, in his edition of 1562, gave the text a rubric of its own before the title *de religiosis*. See F.A. Biener and K.W.E. Heimbach, *Beiträge zur Revision des Justinianischen Codex*, Berlin 1833 (reprint Aalen 1970), p. 82

<sup>25</sup> *Codicis Iustiniani repetitae praelectionis libri duodecim*, Lyons 1627 (reprint Frankfurt/M 2006), column 757–759 and 763–764.

<sup>26</sup> See the explanatory note to line 13 on p. 295 of the edition.

<sup>27</sup> Fol. 67vb ends with C. 3,6,2 (crossed out). Fol. 69ra continues with the last part of C. 3,6,1 (also crossed out), followed by C. 3,6,2 (this time not crossed out). Fol. 68 contains all kind of texts which do not belong to this part of the *Codex*. On fol. 68r we see subsequently D. 1,18,18, D. 1,18,19, D. 1,18,12, the Authentica *Habita* (post C. 4,13,5) of Emperor Frederick Barbarossa (1122–1190) and the constitution *Alearum lusus* (together with *Prohibemus et*).

on a folio the scribe left blank (the verso side of fol. 80) and again is it provided with a direction as to where it belongs: “*Hec constitutio debet esse supra de relig. et sump. fu. et ibi debet legi*”<sup>28</sup>.

The Latin text as edited by Krüger implies that, should those who paid a gambling debt or their heirs be negligent in re-claiming it, the municipal authorities can bring an action. This version of the text is based on only one reading. Krüger’s apparatus to C. 3,43,1 indicates that there are other Latin text versions in the manuscripts, but it does not state that in quite a number of these there is no subsidiary remedy for the municipal authorities (*aut his negligentibus a patribus seu defensoribus locorum*), since the remedy is given to “those who paid or their heirs or their sureties” (*his qui dederunt uel eorum heredibus uel fideiussoribus eorum*)<sup>29</sup>. In other manuscripts there is no mention of municipal authorities either. Instead the remedy is alternately granted to the legal representatives of those who paid (*procuratoribus seu defensoribus eorum*)<sup>30</sup>.

#### 4. – What can the glossators of Roman law teach us?

Investigation into the writings of the glossators provides an indication as to when the constitution must have become known and more widely spread. The glossator Placentinus († ca. 1180)<sup>31</sup> wrote his *Summa Codicis* during his first stay at Montpellier. The manuscripts and the early modern edition of the work (Mainz 1536) contain a commentary on title C. 3,43. However, [135] we know that this version of the work is a later elaboration<sup>32</sup>. The very fact that there is a commentary on C. 3,43 does not mean that in 1180 it was already known that at the end of book III of the *Codex* there would be a title on dicing and dice players. Placentinus’ commentary on C. 3,43 neither mentions nor interprets the text of *Alearum lusus*, but rather seems to reflect the provisions of D. 11,5<sup>33</sup>. First Placentinus described the two instances in which the Digest explicitly stated that playing for money was permissible. With regard to the games, where according to the Digest this was the case, he made one exception namely pugilism, which in his *Summa Codicis* was termed *recalcitrare*, and which, according to Placentinus, was practised in the province. In betting on the other games mentioned, the provision of a surety was additionally permitted: *guadia* as the Lombards called it<sup>34</sup>. Subsequently, Placentinus stated that, if someone had contractual capacity, was of age, in full possession of his faculties, was no prodigal and played for money and lost, he could not be summoned for payment, not even if he had made a promise by stipulation. However, if he paid his gaming debts or provided a pledge, he would have no remedy to claim something back. This was substantiated by only one argument: “although it was not allowed to play for

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<sup>28</sup> See about the addition in the Fulda manuscript Dolezalek, *Repertorium I* (*supra*, n. 8), p. 199.

<sup>29</sup> Fulda 2° D.4, fol. 80v, Berlin, SBPK, lat. fol. 275, fol. 52va-b, Paris, BNF, lat. 16910, fol. 64rb and Alba-Iulia, II.4, fol. 61v.

<sup>30</sup> Montpellier H. 82, fol. 80r, Wien, ÖNB, cvpl 2267, fol. 59va, Avranches 141, fol. 47v-48r, London, BL, Harley 5117, fol. 60r, Paris, BNF, lat. 4523, fol. 59rab and Paris, BNF, lat. 4527, fol. 66rb.

<sup>31</sup> See A. Gouron and L. Montazal, *La date de la mort de Placentin: une fausse certitude*, Tijdschrift voor rechtsgeschiedenis 61 (1993), p. 481–492.

<sup>32</sup> F.C. von Savigny, *Geschichte des römischen Rechts im Mittelalter IV*, Darmstadt 1850 (reprint Bad Homburg 1961), p. 270–276.

<sup>33</sup> Placentinus adopted in his *Summa Codicis* also summaries of Digest titles. See: J. Juncker, *Summen und Glossen. Beiträge zur Literaturgeschichte des kanonischen Rechts im zwölften Jahrhundert*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung 45 (1925), p. 384–474, at 394.

<sup>34</sup> The *guadia* or *wadia* was the promise by a surety to hand over a *festuca* (stick) to the recipient of the promise, which handing over symbolized the obligation by which the two were bound.

money, this was no universal prohibition”<sup>35</sup>. Thus, Placentinus more or less acknowledged a kind of general prohibition against gambling, but in two respects he disregarded the constitution *Alearum lusus* and stood by the provisions of the Digest: he did not generally grant an action to claim back gambling debts, and for the cases where betting was allowed, he did not state that this was restricted to one gold piece. This implies that Placentinus was either not yet familiar with the text of *Alearum lusus* or he ignored it, possibly because it was not yet considered a binding provision of the Justinianic legislation.

[136] The *Summa Codicis* of Azo (ca. 1150-1230), which came into being probably between 1208 and 1210<sup>36</sup>, displays a totally different approach. Azo rejected Placentinus’ view on two grounds. First, the winner who received the money could not defend himself by saying that the plaintiff’s own turpitude prevented him from bringing a claim. This argument could indeed be used by the one, sued under a *condictio ob turpem causam*, when the plaintiff was claiming back what he had given to encourage the defendant’s turpitude. But when something was given in order to enter into a forbidden contract as in the case of gambling, this was different. Moreover, for this case Azo explicitly referred to what he called “the Greek constitution”, granting a reclamation period of 50 years<sup>37</sup>. Beyond doubt this “Greek constitution” was *Alearum lusus*.

The difference of opinion between Placentinus and Azo can be explained as a difference in interpreting the *Codex*, but it seems more likely that Placentinus was still unaware of the existence of the constitution *Alearum lusus* or did not consider it a binding provision of the *Codex*, whereas it is clear that Azo was familiar with the text and accepted its authority. The change of approach between the days of Placentinus and those of Azo, can be the result of granting *Alearum lusus* a well established position at the end of book III of the *Codex*. Thus, our provisional conclusion could be that the constitution *Alearum lusus* was translated, summarized and inserted into the *Codex* somewhere between 1162 and 1210.

## 5. – What can the canonists teach us?

It may not seem very obvious to investigate the writings of the canonists in the hope of finding more details on a civil law constitution as *Alearum lusus*, but nothing is further from the truth. The canonists also discussed the question of reclaiming gambling debts, viz. in their

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<sup>35</sup> Placentinus, *Summa Codicis*, Mainz 1536 (reprint Turin 1962), ad C. 3,43 (fol. 129): “(...) *Ludere in alea non est permissum pro pecunia, praeterquam in familia et uescendi causa et praeter quam si quis certet hasta, uel pilo faciendo, currendo, saliendo, luctando, quod uirtutis causa fiat, ut ff. eod. l. ii (D. 11,5,2), non recalcitrando, sicut fit in prouincia. Sed et in praedictis sponsionem, quam Longobardi gaudias (lege: guadias jh) uocant, facere licet, ex caeteris non licet ut ff. eod. l. iii (D. 11,5,3). Sed paterfamilias, maior, mentis compos, non prodigus, in pecuniam ludendo uictus fuerit, licet conueniri non possit, etiamsi stipulatio intercesserit, puto tamen quia si soluerit, pignusue dederit, remedio carebit. Licet enim ludere in pecuniam sit prohibitum, non est perpetuo prohibitum (...)*”.

<sup>36</sup> H. Lange, *Römisches Recht im Mittelalter I*, Munich 1997, p. 262.

<sup>37</sup> Azo, *Summa Codicis*, Turin, 1578, ad C. 3,43-44 (fol. 65 vb), n. 22-23: “(...) *Si autem paterfamilias in ludo amiserit, ait P. non dari repetitionem eius quod in ludo est amissum, quia licet sit prohibitum ludere, non tamen est perpetuo prohibitum. Item et alia ratione, quia turpitudine uidetur obstare agenti. Sed hoc forte locum habet in conditione ob turpem causam, cum dedi ut quid turpe facias. Sed si dedi contrahendo, ubi lex contractum prohibet, contrarium est, ut infra de agri. et censi. l. Quemadmodum (C. 11,48[47],7). Item graeca constitutio usque quinquaginta annos uidetur dare repetitionem. Nec obstat quod legitur in ff. quarum rerum actio non da. l. Si filio § i. (D. 44,5,2,1). Nam et si in alea rem uendam, aut ludam, et res euincatur, non teneor de euictione, quia emptor suo periculo uidetur rem emisse. Item nec ibi erat prohibita uenditio, sed ludus. Item et si rem lusero, ibi non denegat repetitionem*”.



commentaries on a text in the *Decretum Gratiani* (D.35 c.1). Moreover, in canon law scholarship we find a change of opinion, comparable to the difference between the teachings of Placentinus and those of Azo. Huguccio († 1210) had not yet pronounced on the question in his *Summa decretorum* (between 1188 and 1190)<sup>38</sup>, but [137] we do find an opinion on the subject ascribed to the canonist Bazianus († 1197), who was active in Bologna between 1180 and 1190, i.e. at the time or just after Huguccio wrote his *Summa decretorum*. As in Placentinus' *Summa Codicis*, the claim is denied. The money should not be returned to the loser, but has to be given to the Church or the poor, as ruled elsewhere in the *Decretum*. The fact that the loser had no remedy to reclaim was supported by the argument that the cause of the payment was turpitude and in a case where two individuals were tainted, the actual possessor, that is the recipient of the gambling debts, has the better position<sup>39</sup>. This argument was derived from Roman law. The maxim quoted – *melior est conditio possidentis* – was reminiscent of various texts in the *Corpus iuris civilis*<sup>40</sup>. In a commentary on the *Decretum* dating from around 1205, viz. the apparatus *Ius naturale* of Alanus Anglicus, there is even an explicit reference to Placentinus' opinion, that what the loser paid to the winner cannot be recovered. Moreover, we find here a reference to the "Greek constitution" in the *Codex* title *De religiosis et sumptibus funerum*, which rules that gambling debts, paid to the winner, can be recovered for a period of 50 years. Beyond doubt this is a reference to the constitution *Alearum lusus* and, although it did not prevent Alanus Anglicus from following Placentinus' teachings, it is clear that he was aware of the existence of the text, its content and its place at the end of book III of the *Codex*<sup>41</sup>.

Thus Alanus seems to be the first decretist to be aware of the text of *Alearum lusus*. At the same time he is the last one who defended Placentinus' opinion. Soon the canonists started to adopt a view that came close to the one of Azo and was in conformity with the Greek constitution. But is there anything else they reveal about the origin of the text? In this respect, two commentaries [138] show interesting directions, which could not be traced in the writings of the glossators. The first is the Parisian apparatus *Animal est substantia*, previously known as the *Summa Bambergensis*, which dates from the period 1206–1210. In the Bamberg manuscript of the apparatus the constitution *Alearum lusus* was qualified as recent (*nova*) and

<sup>38</sup> Huguccio, *Summa decretorum* ad D.35 c.1 (Vaticano, BAV, Vat. lat. 2880 [folio numbers hardly legible], Admont 7, fol. 51ra, Vaticano, BAV, Arch. S. Pietro C114, fol. 44va and Paris, BNF, lat. 15396, fol. 39vb): "*alee: Set numquid tenetur quis reddere, quod in tali uel alio illicito ludo acquirit? Credo quod sic; alius non digne satisfaciet, si reddere poterit. Sed numquid in tali acquisitio transfertur dominium? Credo quod sic*".

<sup>39</sup> The opinion of Bazianus is recorded in the *Glossa Palatina* (ca. 1214). See *Glossa Palatina* ad D.35 c.1 (Vaticano, BAV, Reg. lat. 977, fol. 24vb, Vaticano, BAV, Pal. lat. 658, fol. 9va and Laon 476, fol. 21vab): "*Pone ergo, quod aliquis amisit ad aleam. Numquid potest repetere? Bazia[nus] dixit quod non, set pecuniam sic acquisitam dixit ecclesie uel pauperibus erogandam, arg. xiiii. q. v. Non sane (C.14 q.5 c.15). Nam dicebat turpem esse causam et ideo meliorem possidentis conditionem*".

<sup>40</sup> Cf. D. 12.5.3, D. 12.5.8 and D. 12.7.5pr.

<sup>41</sup> Alanus Anglicus, *Apparatus Ius naturale, recensio longior* ad D.35 c.1 (Paris, BNF, lat. 15393, fol. 27vb): "*(...) Ergo queritur an quod in ludo perditur peti possit? Hoc in iudicio p[la]centini quod non. Est enim translatus dominium et cum turpitudine sit ex utraque parte, durior est conditio petentis ut ff. de cond. ob t. c. l. Si ob turpem (D. 12,5,8) et C. e. l. i. et ii. (C. 4,7,1-2). Hac eadem ratione nec quod est amissum repeti potest. Sed numquid si pygnus fuerit datum? Teneretur forte sic. Fideiussorem tamen numquam credo teneri. Sed secundum constitutionem grecam C. de relig. et sump. funerum ... alear. usus usque ad l. annos competit repetitio. Ille autem qui aleatores fauet et eis pecuniam mutuatur ludo, inhoneste enim fecerat. Si reddere noluunt, eos conuenire non potest, ff. de aleatoribus l. i. (D. 11,5,1)*".

it was stated that it should actually be placed in title *De religiosis* which it was not<sup>42</sup>. As we saw above, according to Alanus it was. In which other part of the *Codex* the author of the *Animal* had found the constitution is not clear, but we know it was sometimes added to an entirely different part, such as in Vaticano, BAV, Vat. lat. 1427 and in Fulda 2<sup>o</sup> D.4. In the Bernkastel Kues manuscript of the *Animal* the constitution was qualified as “edited in Greek”<sup>43</sup>, while according to the Liège manuscript it was a constitution of Justinian’s, which a certain cardinal (*quidam cardinalis*) had translated into Latin<sup>44</sup>.

Even more details on *Alearum lusus* can be found in the *Glossa Palatina* of Laurentius Hispanus (ca. 1180-1248), dating from about 1214. First this apparatus stated that the constitution *Alearum lusus* was recently (*nouiter*) translated, secondly that this was done by someone by the name of “b. de cardona” and in the third place that it ruled that the limitation period for reclaiming the money from the winner was 30 years, while that for reclaiming pledges was 50 years<sup>45</sup>. This deviates from the Latin text of *Alearum lusus* as we traced it in the manuscripts of the *Codex*. Nowhere was there mention of reclaiming pledges, while the limitation period for reclaiming gambling debts was always 50 years. The details given by the apparatus *Animal est substantia* and by the *Glossa Palatina* evoke questions that ask for further investigation. Who was the scholar who summarized and translated the Greek [139] text of *Alearum lusus*? And why is the paraphrase of the text, as reproduced by the *Glossa Palatina*, deviating from the versions of the constitution we know from the *Codex* manuscripts?

## 6. – Who epitomized and translated *Alearum lusus*?

If Kantorowicz is in the right in his posthumously published article, our “b. de cardona” would be one and the same as Pedro de Cardona, who is known to have translated other Greek constitutions. His name can be traced at least two or three times in medieval legal sources.

The earliest record can be found in the *Lectura Institutionum* of the glossator Johannes Bassianus (end of twelfth century). Johannes referred to a Greek constitution of Justinian, ruling that, in case freed persons have no children, their patrons are their intestate heirs. Moreover, he stated he had added the translation of this constitution to the title *de bonis*

<sup>42</sup> *Animal est substantia* ad D.35 c.1. Bamberg, Can. 42, fol. 32vb; the transcription is derived from the edition on the internet by Chris Coppens ([http://www.medcanonlaw.nl/Animal\\_est\\_substantia/Distinctiones.html](http://www.medcanonlaw.nl/Animal_est_substantia/Distinctiones.html), consulted August 2012): “alee. (...) Et notandum quod omne illud quod amisit aliquis ad aleam, potest repetere usque ad .l. annos, sicut dicit constitutio nova domini Iustiniani que sic incipit Alearum ludus. Que constitutio debet esse in Cod. De religiosis (C. 3,44) et non est. (...)”.

<sup>43</sup> *Animal est substantia* ad D.35 c.1, Bernkastel–Kues 223, fol. 22rb (the transcription is again derived from the internet edition): “Si quis luserit ad aleam ea que amiserit poterit repetere usque ad .l. annos ex constitutione quadam domini Justiniani in greco edita que sic incipit: Alearum ludus, que debuisset poni in Codice in t. De religiosis et sumptibus funerum et aleatoribus (C. 3,44)”.

<sup>44</sup> In this manuscript the word *cardinalis* is not abbreviated as c. or car., but written at length. See *Animal est substantia* ad D.35 c.1, Liège 127E, Cat. 499, fol. 28rb (this is my own transcription): “Si quis uero luserit ad aleam ea que amittit potest repetere usque ad .l. annos ex constitutione quadam domini Justiniani in greco dicta que sic incipit Alearum ludus, que poni debuisset in eodem titulo de religiosis et sumptibus funerum et alleatoribus (C. 3,44). Et quidam cardinalis transtulit legem illam in latinum”.

<sup>45</sup> *Glossa Palatina* ad D.35 c.1 (Vaticano, BAV, Regin. lat. 977, fol. 24vb, Vaticano, BAV, Pal. lat. 658, ad fol. 9va and Laon 476, fol. 21vab): “Item dicit constitutio, nouiter de greco in latinum translata per quendam b. de cardona, quod usque ad xxx annos potest repetere quis, quod in alea amisit. Et pignora obligata in eam causam usque l. annos repeti possunt. (...)”.

*libertorum* in his own copy of the *Codex*. Unfortunately, only one manuscript of the *Lectura Institutionum* contains further but rather cryptic information concerning the involvement of a certain Petrus de Candona<sup>46</sup>. From the wording it is gathered that this Petrus de Cardona was the translator. Also this Latin constitution *Veteris iuris altercationes* (C. 6,4,4) was an epitome. The existence of *Codex* manuscripts, containing this text, appears from a remark by Jacobus de Ardizzone (ca. 1220) in his *Summa feudorum*. He referred to this text and said that it was located in the margin (*custodia*, i.e. between the glosses) of his copy of the *Codex*<sup>47</sup>. An extant copy of such a *Codex* manuscript is Göttingen, 2° Cod. ms. jurid. 27<sup>48</sup>. Cujas edited the Latin text of the constitution, which he said he had found in *quibusdam membranis*, together with the corresponding Greek text of the Basilica (B. 49,1,28)<sup>49</sup>. Krüger adopted it in his edition of the *Codex*<sup>50</sup>. The Leiden Professor Willem Matthias d'Ablain (1851-1889) was the first [140] who noticed that the name of Candona or Cardona was mentioned in the *Lectura Institutionum* of Johannes Bassianus<sup>51</sup>.

Pedro de Cardona also features as the translator of another Justinian constitution, viz. that of C. 3,10,2. In an addition to this translation, *Zenonis diue memorie*, the manuscript London, BL, Harley 5117 (fol. 47r) contains the following words "*Constitutio a domino Petro de Cardona translata de greco in latinum*". This Latin translation was also handed down through medieval manuscripts. It was printed in 1571 by Leconte. In the nineteenth century the German jurist Hermann Wilhelm Hach (1800-1867) was the first who noticed Cardona's name in the London manuscript<sup>52</sup>. Krüger added to his edition the text from Leconte's edition.

The name Petrus de Cardo, possibly Pedro de Cardona, is also mentioned in a gloss of Bernard of Compostella antiquus (early 13<sup>th</sup> century), the teacher of Laurentius Hispanus. It appears in the *Compilatio prima* (ad 1 Comp. 3,22,2) in the manuscript Modena, BE, a.R. 4,16-lat. 968 (fol. 37ra). According to this gloss, edited in 1943 by Stephan Kuttner (1907–1996), this Pedro applied the solution of D. 28,2,13 to an inheritance case<sup>53</sup>.

What we know about the life of Pedro de Cardona does not cast more light on the probability he was indeed the one who translated and epitomized *Alearum lusus*. His father was Ramón Folch, Viscount of Cardona. His mother was Sibila, the daughter of the Count of Urgel. Pedro was canon of Vich. He studied or taught law in Montpellier in connection with Placentinus, became abbot of Husillos and in 1178 chancellor of Castile. Pope Alexander III

<sup>46</sup> Johannes Bassianus' *Lectura Institutionum* ad Inst. 3.7 in Leiden, D'Ablain 3, fol. 12ra: "*Sciendum est patronos succedere libertis non habentibus liberos ab intestato ex constitutione Iustiniani in greco posita immo in C. de bonis libertorum de nouo posui, quia Petrus de Candona ipsam desperando tulit*". In the manuscript Leipzig 921 (fol. 172vb) the last line is lacking.

<sup>47</sup> Jacobus de Ardizzone, *Summa feudorum*, Asti 1518 (reprint Turin 1970), Pars I, Si uasallus refutauerit feudum domino (fol. 18ra): "(...) in constitutione libertorum Veteris iuris in fine et est mihi in custodia codicis constitutio greca (...)." See F.C. von Savigny, *Geschichte des römischen Rechts im Mittelalter* V, Darmstadt 1850 (reprint Bad Homburg 1961), p. 87, note i.

<sup>48</sup> The constitution *Veteris iuris altercationes* with inscription can be found at fol. 34vab. See about this manuscript: F.C. von Savigny, *Vermischte Schriften* III, Berlin 1850, p. 8-9.

<sup>49</sup> Observationum et Emendationum Liber 20, cap. 34, in: Jacobus Cujacius, *Opera Omnia* Tom. IV, Lyons 1614, column 1882–1889.

<sup>50</sup> Krüger, *Codex* (supra, n. 1), p. 515–517.

<sup>51</sup> W.M. D'Ablain, *Zur "Bibliothek der Glossatoren"*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung 9 (1888), p. 13-42, at p. 40.

<sup>52</sup> H.W. Hach, *Kurze Nachricht von einigen, in Englischen Bibliotheken aufbewahrten, Handschriften, welche Theile des Corpus juris civilis enthalten*, Zeitschrift für geschichtliche Rechtswissenschaft 5 (1825), p. 131-241, at p. 213-214. As stated above also the constitution *Alearum lusus* can be found in this manuscript (at fol. 60r). Both texts seem to be copied by the same hand as the principal text.

<sup>53</sup> See S. Kuttner, *Bernardus Compostellanus Antiquus. A study in the glossators of the canon law*, Traditio 1 (1943), p. 277–340, at p. 317.

(ca. 1100–1181) had him ordained sub-deacon with the intention of binding him to the papal Curia. In 1181 he was elected archbishop of Toledo, which election he accepted. However, he was not consecrated and resigned. In December of the same year he was created cardinal-priest by Pope Lucius III (1100–1185) under the title of St. Laurence in Damaso. He died on 26 June 1183. In the necrology of Vich he is recorded as *Doctor legum magnificus*<sup>54</sup>.

[141]

## 7. – Which text version of *Aleorum lus* is reflected in the *Glossa Palatina*?

As stated above, there are some remarkable differences between the Latin epitome *Aleorum lus* and the paraphrase of the same constitution, given in the *Glossa Palatina*. The latter mentions a limitation period of 30 years instead of 50 years for claiming back gambling debts. Moreover, it pronounces upon the possibility of claiming back pledges, a topic which was not even mentioned in the Latin epitome. It is not easy to think of an explanation for these differences.

First, we do not know which Greek materials constituted the basic texts underlying the new Latin constitutions in the *Codex*. Krüger was of the opinion that the scholars of the twelfth century in Western Europe had Byzantine *indices* (summaries), translated into Latin, at their disposal. Before the twelfth century traces of Greek constitutions were still lacking in the manuscripts<sup>55</sup>. According to the more recent view of Kantorowicz, the translators of the twelfth century used manuscripts of the *Codex* which still contained parts or all of the Greek fragments.<sup>56</sup> None of such manuscripts has survived. In order to make it clear that such manuscripts indeed existed, Kantorowicz referred to a gloss, stating that the glossator Bulgarus († 1166) lectured on C. 6,4,4, a constitution which others did not have at their disposal. This gloss (ad C. 6,4,4) was traced by Louis Le Caron (Charondas, 1534–1613) in one of his manuscripts: “*deficit graeca constitutio, quam legit Bulgarus, sed alii non habent*”<sup>57</sup>. As we have seen, however, in the manuscripts the term *constitutio greca* is commonly used in connection with Latin translations or Latin epitomes and actually this term does not denote a constitution written in Greek, but a constitution which was originally composed in Greek.

It is possible that Laurentius Hispanus had seen a corrupt version of Pedro de Cardona’s translation, but the deviations of his paraphrase from the Latin translation could not be found in any *Codex* manuscript. It is striking that Laurentius Hispanus’ paraphrase comes closer to the

<sup>54</sup> Literature: F. Valls-Taberner, *Le juriste catalan Pierre de Cardona, cardinal de l’église romaine sous Alexandre III*, in: Mélanges Paul Fournier, Paris, 1929, p. 743-746; B. Alonso Rodríguez, *Cardona, Pedro de*, in: Diccionario de historia eclesiastica de España Vol. I, p. 352; A. Gouron, *Autour de Placentin à Montpellier. Maître Gui et Pierre de Cardona*, *Studia Gratiana* 19 (1976), p. 337-354, reprinted in A. Gouron, *La science du droit dans le Midi de la France au Moyen Age* [Collected studies series, 196], London 1984, as no. VIII, at 347–354; A. Gouron, *La science juridique française aux xi<sup>e</sup> et xii<sup>e</sup> siècles. Diffusion du droit de Justinien et influences canoniques jusqu’ à Gratien*, *Ius Romanum Medii Aevi* I 4 d-e, Milan 1978, p. 1–118, reprinted in A. Gouron, *Études sur la diffusion des doctrines juridiques médiévales* [Collected studies series, 264], London 1987, as no. II, at p. 108 and A. García y García, *La canonística Ibérica (1150-1250) en la investigación reciente*, *Bulletin of medieval canon law* NS 11 (1981), p. 41-75, at p. 63-64.

<sup>55</sup> Krüger, *Codex* (*supra*, n.1), p. XXII; see also M. Conrat (Cohn), *Geschichte der Quellen und Literatur des römischen Rechts im frühen Mittelalter*, Leipzig 1891 (reprint Aalen 1963), p. 121 and note 2.

<sup>56</sup> Kantorowicz, *Greek Justinian* (*supra*, n. 3), at p. 195.

<sup>57</sup> According to Biener Bulgarus, who did not master Greek, must have lectured on the Latin translation. See F.A. Biener, *Geschichte der Novellen Justinian’s*, Berlin 1824, p. 579. See also Savigny, *Geschichte IV*, (*supra*, n. 32), p. 408 note a.

text of Nomocanon 13,29, i.e. the text which the humanist jurists considered as going back [142] to the same Justinianic constitution. The latter speaks in connection with the claiming back of gambling debts about a period of 30 years, although the verbatim text says “continuously and even for more than 30 years” (διηνεκῶς καὶ πέραν τριακονταετίας). Moreover, it rules that “a given security is void and is given back” (καὶ ἡ γενομένη ἐπὶ κόττω ἀσφάλεια ἄκυρός ἐστι, καὶ ἀποδίδεται)<sup>58</sup>.

## 8. – Conclusions

*Alearum lusus* is clearly a Latin epitome of a Greek constitution which was handed down in the twelfth century. The Kantorowicz’s hypothesis that Pedro de Cardona must have been the translator is more or less confirmed by the writings of the canonists we have traced. The author of the *Animal* mentioned *quidam cardinalis* as translator and that does include Pedro de Cardona, since in 1181 the latter was created cardinal. The *Glossa Palatina* even mentioned the name of Cardona. Only some doubt is caused by the fact that two manuscripts clearly reflect a different initial for his first name viz. b. instead of p.<sup>59</sup>. In a third manuscript the initial is not very clear<sup>60</sup>. Supposing that Pedro de Cardona was indeed the author of the Latin epitome *Alearum lusus*, it must date from before the year of his death (1183) and it must have been spread during the following decades. The substantial change of opinion it caused, can be dated for the civilians between 1162 and 1210 and for the canonists around 1205.

If Pedro de Cardona was indeed the translator, this also implies that the word *cardinalis* in early thirteenth century manuscripts of Canon law may be referring to our Catalan translator, unless the text of the Liège manuscript of the *Animal* is corrupt, because the scribe had misinterpreted an abbreviated form of the name of Cardona from the original he copied and transformed it into *cardinalis*. This is of importance since the glossator with *siglum* c. or car. for *cardinalis* was identified by André Gouron (1931–2009) as indicating Raymond de Arènes from Nîmes<sup>61</sup>. We should not exclude the possibility that *cardinalis* may also stand for Pedro de Cardona.

The text of *Alearum lusus* as we know it from the *Codex* manuscripts and the one of Laurentius Hispanus’ paraphrase in the *Glossa Palatina* of the *Decretum* may go back to divergent sources of Byzantine origin. Pedro de Cardona may have seen the original Greek text, Laurentius Hispanus a Latin [143] index with a reading more close to that of the Nomocanon. Another possibility would be that both scholars departed from the one and the same text tradition, related to the version of the Nomocanon, but that the epitome of Pedro de Cardona started to deviate from the original, either through his own doing, a later elaboration or by clerical error. “Continuously and even for more than 30 years” transformed into “50 years” and the remark on “a given security” simply vanished. At the same time Laurentius Hispanus could have misinterpreted the Greek text. “Continuously and even for more than 30 years” was reduced to “30 years” and the giving back of security was provided with a limitation period, viz. 50 years. Whatever may have been the case, it is not illogical to suppose – as did

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<sup>58</sup> See Pitra, *Iuris ecclesiastici graecorum historia et monumenta* II (*supra*, n. 21), p. 630. A comparison between C. 3,43,1 and Nomocanon 13,29 can be found in R. Meijering, *Anatolius and Peter of Cardona on sports and sportulae. C. 3.10.2 and 3.43.1*, Subseciva Groningana 6 (1999), p. 77-90, at p. 87ff., however without pronouncing on the phrasing of the limitation period in both texts.

<sup>59</sup> These manuscripts are Vaticano, BAV, Reg. lat. 977 and Vaticano, BAV, Pal. lat. 658.

<sup>60</sup> At least on the microfilm. This manuscript is Laon 476.

<sup>61</sup> See A. Gouron, *Le cardinal Raymond des Arènes: Cardinalis?*, *Revue de droit canonique* 28 (1978), p. 180-192.

Paul Krüger when editing the *Codex* – that in the twelfth century there were some learned jurists in Western Europe who had access to Byzantine materials<sup>62</sup>.

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<sup>62</sup> Most of the manuscripts referred to were consulted on microfilms. I would like to thank the Max Planck–Institute for European Legal History at Frankfurt am Main, where part of the investigations took place, Andreas Schminck (Academy of Sciences, Göttingen) for his help and advice and Margaret Hewett (University of Cape Town) for further advice and correcting the English of my text.